

1 The Honorable James L. Robart
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 SEAN POWELL, individually and on
10 behalf of all others similarly situated,

11 Plaintiff,

12 v.

13 UNITED RENTALS (NORTH AMERICA),
14 INC.,

15 Defendant.

No. 2:17-cv-01573-JLR

DEFENDANT UNITED RENTALS'
REPLY IN SUPPORT OF MOTION TO
COMPEL ARBITRATION AND TO
DISMISS

NOTE ON MOTION CALENDAR:
December 7, 2018

ORAL ARGUMENT REQUESTED

27 UNITED RENTALS' REPLY IN SUPPORT OF
MOTION TO COMPEL ARBITRATION
(2:17-cv-01573-JLR)

4817-1411-3666v.8 0110505-000001

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UNITED RENTALS' REPLY IN SUPPORT OF
MOTION TO COMPEL ARBITRATION

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I. SUMMARY OF REPLY

2 The Court should grant United Rentals' Motion to Compel Arbitration and to Dismiss.
3 Powell does not contest many of the issues central to that Motion. Instead, Powell asserts only
4 four arguments—each of which lacks merit. *First*, Powell contends the Arbitration
5 Agreement's choice-of-venue clause—which neither party has sought to enforce—deprives this
6 Court of authority to rule upon the Motion. It does not under well-settled law. *Second*, Powell
7 argues that this Court should address gateway issues despite the parties' incorporation of the
8 AAA rules because, he says, district courts within the Ninth Circuit “overwhelmingly
9 conclude” that *Brennan v. Opus Bank* extends only to sophisticated parties. 796 F.3d 1125 (9th
10 Cir. 2015). Although some decisions have reached that conclusion, most courts have held
11 *Brennan* applies equally to any party. *Third*, relying on the flawed position that it is
12 appropriate for this Court to consider the issue rather than an AAA arbitrator, Powell argues the
13 Arbitration Agreement is both procedurally and substantively unconscionable, but he falls far
14 short of meeting his burden to establish either defense. *Finally*, Powell contends the Court
15 should not dismiss the class and collective claims because a new named plaintiff could be
16 substituted, but he fails to identify any such individual even though the case has now been
17 pending for 13 months. The Court should compel Powell to individual arbitration and dismiss
18 his individual claims along with the putative class and collective claims.

II. ARGUMENT

A. United Rentals' Motion is Largely Unopposed.

21 Powell does not contest several of the arguments central to United Rentals' Motion,
22 thereby conceding that: (1) the FAA applies to the Arbitration Agreement (Dkt. No. 62 at 11:4–
23 27); (2) the Arbitration Agreement was formed through an offer, acceptance of that offer, and is
24 supported by consideration (*id.* at 13:1–14:6); (3) Powell's claims fall within the Arbitration

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1 Agreement's scope (*id.* at 14:7–22); and (4) any arbitration must proceed on an individual basis
 2 (*Id.* at 14:23–15:18).¹ He fares no better on the issues he contests.

3 **B. The Choice-of-Venue Clause Does Not Limit the Court's Authority.**

4 The Court should reject Powell's unsupported argument that the Arbitration
 5 Agreement's choice-of-venue clause limits this Court's authority to rule upon United Rentals'
 6 Motion for two reasons. Dkt. No. 66 at 11:11–12:6. *First*, “[p]rivate parties cannot defeat the
 7 subject matter jurisdiction of the federal courts by means of a forum-selection clause, any more
 8 than they could, by the same means, *confer* such jurisdiction on this court in a case in which
 9 diversity or a federal question were lacking.” *Licensed Practical Nurses, Technicians &*
 10 *Health Care Workers of New York, Inc. v. Ulysses Cruises, Inc.*, 131 F. Supp. 2d 393, 402–03
 11 (S.D.N.Y. 2000) (emphasis in original); *accord M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S.
 12 1, 12 (1972) (“No one seriously contends in this case that the forum selection clause ‘ousted’
 13 the District Court of jurisdiction over Zapata’s action.”); *Godsey v. Miller*, 9 Fed.Appx. 380,
 14 383 (6th Cir.2001) (“[T]he issue of a forum selection clause is an independent contractual
 15 concern created by the actions of the parties, and is not linked to the inherent subject-matter
 16 jurisdiction of the court.”); *Perini Corp. v. Orion Ins. Co.*, 331 F. Supp. 453, 455 (E.D. Cal.
 17 1971) (“No individual, whether by contract or otherwise, can deprive the Court of the
 18 jurisdiction which Congress confers upon it.”). This Court has possessed subject matter
 19 jurisdiction over this case since it was filed. Further, the FAA expressly provides this Court
 20 with statutory authority to consider United Rentals' Motion by requiring that a defendant seek
 21 to enforce an arbitration agreement by motion “[in] the court in which such suit is pending.” 9
 22 U.S.C. §§ 3, 6. The Arbitration Agreement's forum-selection clause does not—and cannot—
 23 abridge that jurisdiction or authority.² And Powell cites no case reaching that conclusion.

24 _____
 25 ¹ *Selliken v. Country Mut. Ins. Co.*, 2013 WL 4759083, at *3 (E.D. Wash. Sept. 4, 2013) (failure to address an
 argument operates as concession).

26 ² See also *Cont'l Grain Co. v. Dant & Russell*, 118 F.2d 967, 969 (9th Cir. 1941) (“The [plaintiff], having invoked
 the jurisdiction of the United States District Court for Oregon is hardly in a position to complain that it has
 exercised that jurisdiction in accordance with the statute giving it jurisdiction.”).

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1 **Second**, Powell has waived any benefit of the forum selection clause by not seeking to
 2 transfer venue under 28 U.S.C. § 1404(a) based on the Arbitration Agreement's choice-of-
 3 venue clause.³ United Rentals also chose to not enforce that choice-of-venue clause for the
 4 convenience of the parties. Powell lives in Washington, his employment occurred in
 5 Washington, and the parties have retained counsel in Washington.

6 The result of the parties mutually declining to enforce the choice-of-venue clause is
 7 merely a waiver of their respective rights under that clause—just as the parties may waive any
 8 other clause in a contract. *See, e.g., BBC Chartering & Logisitic, GmbH & Co. v. Vestas Am.*
 9 *Wind Tech., Inc.*, 2009 WL 1812251, at *2 (W.D. Wash. June 23, 2009) (“A party may
 10 unilaterally waive any provision of a contract or statute that is intended for that party’s
 11 benefit. Forum selection clauses, however, generally benefit both parties.”) (citations omitted);
 12 *Baosteel Am., Inc. v. M/V “OCEAN LORD”*, 257 F. Supp. 2d 687, 689 n.1 (S.D.N.Y. 2003)
 13 (“[T]his language only states the obvious fact that contracting parties may mutually agree to
 14 waive a forum selection clause.”).

15 Indeed, Powell cites no case holding a court cannot enforce an arbitration agreement
 16 despite a choice-of-venue clause where, as here, neither party has sought to transfer venue.
 17 This Court therefore has jurisdiction to decide this fully-briefed motion.

18 **C. The Arbitration Agreement Delegates Gateway Issues to the Arbitrator.**

19 The Arbitration Agreement’s incorporation of the AAA’s Employment Arbitration
 20 Rules and Mediation Procedures delegated questions of arbitrability to the arbitrator as a matter
 21 of law, irrespective of Powell’s level of sophistication. Dkt No. 63 at 13; Dkt. No. 64 at 12.
 22 While *Brennan* did not specifically decide whether incorporating the AAA rules in a contract
 23 between unsophisticated parties delegated gateway issues to the arbitrator, the decision contains
 24 no suggestion its holding should be so constrained:

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³ *Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 62 (2013) (“When the parties
 27 have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum
 specified in that clause.”).

UNITED RENTALS’ REPLY IN SUPPORT OF
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1 Our holding today ***should not be interpreted*** to require that the
 2 contracting parties be sophisticated or that the contract be
 3 “commercial” before a court may conclude that incorporation of
 4 the AAA rules constitutes “clear and unmistakable” evidence of
 5 the parties’ intent. Thus, our holding does not foreclose the
 6 possibility that this rule could also apply to unsophisticated
 7 parties or to consumer contracts. Indeed, the vast majority of the
 8 circuits that hold that incorporation of the AAA rules constitutes
 9 clear and unmistakable evidence of the parties’ intent do so
 10 without explicitly limiting that holding to sophisticated parties or
 11 to commercial contracts.

12 796 F.3d at 1130–31 (emphasis added).

13 It is true that several district courts have failed to heed the Ninth Circuit’s directive.
 14 Dkt. No. 66 at 13:20–14:5. However, Powell is mistaken that district courts within the Ninth
 15 Circuit “overwhelmingly conclude that this incorporation rule does not apply when a party to
 16 the contract is an unsophisticated consumer or employee.” *Id.* at 13:17–20. “[T]he greater
 17 weight of authority has concluded that the holding of [*Brennan*] applies similarly to non-
 18 sophisticated parties.” *Miller v. Time Warner Cable Inc.*, 2016 WL 7471302, at *5 (C.D. Cal.
 19 Dec. 27, 2016) (citations omitted) (adopting majority position). “This is for good
 20 reason. *Brennan* expressly cautioned that its holding should not be understood to ‘foreclose the
 21 possibility that this rule could also apply to unsophisticated parties.’” *McLellan v. Fitbit, Inc.*,
 22 2017 WL 4551484, at *2 (N.D. Cal. Oct. 11, 2017) (quoting *Brennan*, 796 F.3d at 1130–31);
 23 *accord Fruth v. AGCS Marine Ins. Co.*, 2016 WL 6806368, at *3 (N.D. Cal. Mar. 31, 2016)
 24 (“The Ninth Circuit was crystal clear in emphasizing that ‘[o]ur holding today should not be
 25 interpreted to require that the contracting parties be sophisticated.’”) (quoting *Brennan*, 796
 26 F.3d at 1130) (alterations in original).

27 Powell cites to five district court decisions to support his contention that the Ninth
 28 Circuit’s district courts “overwhelmingly conclude” that *Brennan*’s holding does not extend to
 29 unsophisticated parties. Dkt. No. 66 at 13:20–14:5. A review of Powell’s cases reinforces that
 30 he is mistaken. One of those decisions predates *Brennan*. *See Tompkins v. 23andMe, Inc.*,
 31 2014 WL 2903752 (N.D. Cal. June 25, 2014). Another was reversed by the Ninth Circuit on

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1 the very proposition for which Powell cites the opinion. *See Galilea, LLC v. AGCS Marine Ins.*
 2 *Co.*, 2016 WL 1328920, at *4 (D. Mont. Apr. 5, 2016), *aff'd in part, rev'd in part and*
 3 *remanded*, 879 F.3d 1052 (9th Cir. 2018) (finding both parties were sophisticated and therefore
 4 declining to decide whether *Brennan* applies to unsophisticated parties).

5 Powell also argues that the parties' incorporation of the AAA rules does not clearly and
 6 unmistakably delegate gateway issues to the arbitrator because the choice-of-venue clause
 7 creates confusion. Not so. The choice-of-venue clause does not mention the word
 8 "arbitrability" or any synonyms. Dkt. No. 64 at 13.⁴

9 Therefore, the Court need go no further and should compel Powell's claims to
 10 arbitration.

11 **D. The Arbitration Agreement is Neither Procedurally Nor Substantively**
12 Unconscionable under Washington Law.

13 Even if the Court were to address Powell's unconscionability arguments, it should still
 14 grant United Rentals' Motion because Powell fails to meet his burden to show that the
 15 Arbitration Agreement is unconscionable. *Cockerham v. Sound Ford, Inc.*, 2006 WL 2841881,
 16 at *1 (W.D. Wash. Sept. 29, 2006) (Robart, J.) (citations omitted) ("The party resisting
 17 arbitration bears the burden of proving such a defense."). Washington courts "recognize[] two
 18 categories of unconscionability, substantive and procedural." *Zuver v. Airtouch Commc'n*s,
 19 *Inc.*, 153 Wn.2d 293, 303 (2004) (citations omitted). A party challenging a contract may do so
 20 on either basis. *Whitley v. Wells Fargo Bank, N.A.*, 2008 WL 11343453, at *3 (W.D. Wash.
 21 June 2, 2008) (citations omitted). The Arbitration Agreement is neither.

22 **1. Powell Fails to Demonstrate Procedural Unconscionability.**

23 Under Washington law, procedural unconscionability is "the lack of meaningful choice,
 24 considering all the circumstances surrounding the transaction." *Zuver*, 153 Wn.2d at 303
 25 (citations and quotations omitted). Powell's procedural unconscionability argument rests on his

26 ⁴ Similarly unavailing is Powell's invocation of the void-for-vagueness doctrine because neither party is making a
 27 due process challenge to a statute. Dkt. No. 66 at 14:24–28 (citing *Am. Legion Post #149 v. Washington State*
Dep't of Health, 164 Wn.2d 570, 612 (2008) (describing void-for-vagueness doctrine)).

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1 assertion that the Arbitration Agreement “is an adhesion contract.” Dkt. No. 66 at 15:24–17:5.
 2 That is not enough for procedural unconscionability—as both this Court and the Washington
 3 State Supreme Court have recognized. *Cockerham*, 2006 WL 2841881, at *1 (holding a
 4 standard form adhesion contract offered to an employee on a ““take it or leave it”” basis “is
 5 not . . . dispositive on the question of procedural unconscionability.”) (citations omitted);
 6 *Zuver*, 153 Wn.2d at 305 (“Washington courts have long held that the fact that unequal
 7 bargaining power exists will not, standing alone, justify a finding of procedural
 8 unconscionability.”) (citations omitted).⁵

9 Under *Zuver*, a party challenging an arbitration agreement on the basis of procedural
 10 unconscionability must “[a]t minimum” provide evidence that (1) the employer refused to
 11 respond to his questions or concerns, (2) the employer placed “undue pressure” upon the
 12 employee to sign the agreement without providing a reasonable opportunity to consider its
 13 terms, or (3) that the terms of the agreement were “hidden in a maze of fine print.” 153 Wn.2d
 14 at 303, 306–07 (citations omitted). Powell does not provide any evidence or argument
 15 addressing the first two bases. Instead, the only evidence in the record shows Powell could
 16 contact United Rentals with any questions he had about the Arbitration Agreement, which he
 17 could review for as long as he wished before executing.⁶

18 Powell makes only a cursory argument regarding the third basis, contending “[t]he key
 19 terms of the Agreement are buried in dense legal language. In fact, the Agreement is not even
 20 prefaced by a title to indicate that it is an arbitration agreement.” Dkt. No. 66 at 16:2–10. That
 21 is untrue. The Arbitration Agreement is a one-and-a-half page stand-alone document printed in
 22 normal-sized font and written in plain language.

23
 24 ⁵ Powell’s arguments regarding Restatement (Second) of Conflict of Laws § 187 (1971) are not helpful. Dkt. No.
 25 66 at 16:25–28. The parties do not dispute that Washington law applies to Powell’s claims and the Arbitration
 26 Agreement. *McKee v. AT & T Corp.*, 164 Wn.2d 372, 384 (2008) (applying section 187 to dispute over
 27 contractual choice-of-law provision). Therefore, there are no choice-of-law issues to analyze.

28
 29 ⁶ Dkt. No. 64 at ¶¶ 8, 10 (Marzulla Declaration explaining Powell was provided with United Rentals’ contact
 30 information during the application process and that he “could take as long as he wanted to review the one-and-a-
 31 half page arbitration agreement.”).

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1 Moreover—and contrary Powell’s assertion—the Arbitration Agreement is
 2 denominated in bold font as “**The Mutual Agreement to Arbitrate.**” Dkt. No. 64 at 12–13.
 3 The first page also states in bold capital letters “**PLEASE REVIEW THIS SCREEN**
 4 **CAREFULLY BECAUSE IT CONTAINS BINDING CONTRACTUAL TERMS THAT**
 5 **AFFECT YOUR LEGAL RIGHTS. BY SELECTING THE ‘I ACCEPT’ BUTTON**
 6 **BELOW YOU ARE AGREEING TO BE BOUND TO ALL THE TERMS CONTAINED**
 7 **ON THIS SCREEN.**” *Id.* at 12. While the Arbitration Agreement is a legal document
 8 communicating legal concepts, its key terms are hardly “buried in dense legal language.” *Id.* at
 9 12–13. For example, the signature page clearly states “By entering into this Agreement, you
 10 are giving up certain rights, including the right to file a lawsuit in a court of law or have a jury
 11 trial.” *Id.* at 13.

12 Powell also contends he does not remember executing the Arbitration Agreement and
 13 did not receive the AAA arbitration rules. Dkt No. 66-1 at ¶¶ 6–9. That assertion, however,
 14 does not relieve Powell of his contractual obligations. *See Sprinkle v. Gen. Dynamics Land*
 15 *Sys.*, 2010 WL 1330328, at *9 (W.D. Wash. Mar. 30, 2010) (rejecting plaintiffs’ procedural
 16 unconscionability arguments that “they do not remember signing the agreements to arbitrate;
 17 they did not know that they were agreeing to arbitrate discrimination claims; no one explained
 18 the DRP to them; and they did not receive a copy of the Dispute Resolution Handbook until
 19 their terminations.”) (citations omitted); *accord Tjart v. Smith Barney*, 107 Wn. App. 885, 897
 20 (2001) (“One who accepts a written contract is conclusively presumed to know its contents and
 21 to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another
 22 contracting party.”).

23 Courts confronting similar facts consistently have found that the agreements are not
 24 procedurally unconscionable. In *Cockerham*, this Court rejected the plaintiff’s procedural
 25 unconscionability argument where the plaintiff failed to “allege that any particular Sound Ford
 26 employee threatened her job if she failed to sign the documents within a certain time frame or

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1 that anyone refused to answer her questions.” 2006 WL 2841881, at *2; *accord Zuver*, 153
 2 Wn.2d at 306 (“She had ample opportunity to contact counsel or even Airtouch with any
 3 concerns or questions she might have had about the terms of the agreement. She did neither.”)
 4 (citations omitted). Turning to the arbitration agreement itself, the Court noted “[it] is a
 5 relatively short (four-page) stand-alone document, printed in normal-sized font; the front page
 6 bears a descriptive title in capital letters, and the last page includes a warning in capital letters
 7 cautioning the employee to read the document prior to signing it.” *Id.* at *1. Here, the one-
 8 and-a-half page stand-alone Arbitration Agreement is, if anything, shorter and more digestible
 9 than the arbitration agreement in *Cockerham*. *See Huang v. Washington Mut. Bank*, 2008 WL
 10 4103918, at *5 (W.D. Wash. Aug. 25, 2008) (rejecting challenge and “not[ing] that the
 11 document itself is only two pages long.”).

12 **2. Powell Fails to Demonstrate Substantive Unconscionability.**

13 Powell acknowledges this contract defense requires him to demonstrate that the
 14 Arbitration Agreement’s terms are “overly or monstrously harsh, [] one sided, or [] exceedingly
 15 calloused.” Dkt. No. 66 at 17:7–11 (citing *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 55
 16 (2013)). Yet Powell fails to come close to making the requisite showing.

17 First, Powell argues the Arbitration Agreement is substantively unconscionable
 18 because, he claims, “the limitations period for arbitrating claims is significantly shorter than the
 19 statute of limitations for filing a private lawsuit.” Dkt. No. 66 at 17:17–20. The provision at
 20 issue is under the section entitled “**The Arbitration Process**” and states

21 Any claim for arbitration will be timely only if brought within the
 22 time in which an administrative charge or complaint would have
 23 been filed if the claim is one which could be filed with an
 24 administrative agency. If the arbitration claim raises an issue
 which could not have been filed with an administrative agency,
 then the claim must be filed within the time set by the appropriate
 statute of limitations.

25 Dkt. No. 64 at 12.

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1 This provision is intended to provide the parties to the Agreement with the same amount
 2 of time to file a claim for arbitration as the law would otherwise allow for the claim's
 3 prosecution outside of the arbitration process. Powell contends this provision "requires Powell
 4 to potentially forego the opportunity to file his complaint and have that complaint investigated
 5 and mediated by the EEOC or Washington Human Rights Commission (WHRC), and instead
 6 timely pursue his claims against Defendant at arbitration." Dkt. 66 at 18:1–14 (citations
 7 omitted). That is inapposite because the wage-and-hour claims Powell asserts are not subject to
 8 either the EEOC's or WHRC's jurisdiction. *See* RCW 49.60.230(2); 42 U.S.C. § 2000e–
 9 5(e)(1). Further, the Arbitration Agreement expressly provides that "this Agreement does not
 10 prohibit the filing of an administrative charge with a federal, state, or local administrative
 11 agency." Dkt. No. 64 at 12. In any event, to the extent this provision **could** be construed to
 12 abridge Powell's rights under any applicable statute of limitations, United Rentals specifically
 13 commits to affording Powell the same limitations period that would apply in court. *Zuver*, 153
 14 Wn.2d at 309–10 (defendant mooted plaintiff's substantively unconscionability argument by
 15 offering to "'defray the cost of arbitration' by paying arbitration fees."); *Cockerham*, 2006 WL
 16 2841881, at *2 (same).

17 **Second**, Powell's argument that "the Agreement is one-sidedly drafted by Defendant in
 18 favor of Defendant" is both factually inaccurate and legally baseless. Dkt. No. 66 at 18:15–20.
 19 Powell contends "[t]he potential claims listed as examples in the Agreement apply only to
 20 disputes brought by employees, and not to disputes brought by Defendant against its
 21 employees." *Id.* However, the Arbitration Agreement's section entitled "**The Mutual**
 22 **Agreement to Arbitrate**" clearly states that Powell and United Rentals "are mutually required
 23 to arbitrate any and all disputes that could be brought in a court" that arise from Powell's
 24 employment with United Rentals. Dkt. No. 64 at 12. The Arbitration Agreement lists as
 25 examples claims that could be brought by either party, including claims based upon "any other

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1 federal, state, or local law, ordinance or regulation, or based on any public policy, contract, tort,
 2 or common law.” *Id.*

3 Powell’s assertion that “Defendant conveniently carves out claims not subject to
 4 arbitration to its own benefit” is similarly without factual substantiation or legal merit. Dkt.
 5 No. 66 at 18:19–25. Powell argues the Agreement excludes from its ambit “claims for trade
 6 secret and confidentiality – claims which only employers would bring.” *Id.* The Arbitration
 7 Agreement, however, also excludes claims that only employees would bring, including claims
 8 for workers’ compensation benefits, claims for unemployment compensation, and claims based
 9 upon pension plans. Dkt. No. 64 at 12. The Arbitration Agreement additionally excludes
 10 claims that could be brought by either employers or employees, including claims covered by a
 11 written employment agreement and lawsuits for “temporary/preliminary injunctive relief.” *Id.*
 12 Courts routinely enforce arbitration agreements with similar carve outs. *E.g., Sprinkle*, 2010
 13 WL 1330328, at *10 (rejecting challenge to agreement that excluded disputes “related to
 14 workers’ compensation; unemployment compensation; intellectual property and trade secrets;
 15 and claims under any benefit plan, pension plan, or other agreement that has its own dispute
 16 resolution process.”) (citing *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354, 360, 361
 17 (2004)); *see also id.* (“Because Plaintiffs and Defendant are all bound by the DRP Agreement,
 18 and because Plaintiffs and Defendant are all limited in the claims that they can bring outside of
 19 arbitration, the Court finds that the DRP Agreement does not lack mutuality.”).⁷

20 Powell therefore fails to meet his burden to prove unconscionably and should be
 21 compelled to individual arbitration.

22

23

24

25 ⁷ Powell fails to demonstrate that any provision of the Arbitration Agreement is unconscionable. However, even if
 26 Powell’s arguments had merit, “the court may enforce the remainder of the contract without the unconscionable
 27 clause” even in the absence of a severability clause. *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316,
 329–30 (2009). “Application of this rule facilitates the accomplishment of important federal and state public
 policies favoring arbitration of disputes.” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 359 (2004).

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E. The Court Should Dismiss Powell’s Individual Claims and the Putative Class and Collective Claims.

2 After compelling Powell’s claims to arbitration, the Court should dismiss Powell’s
3 individual claims. Dkt. No. 62 at 15:19–16:9. Indeed, Powell does not provide any argument
4 or authority to support his naked request that his individual claims not be dismissed. *See* Dkt.
5 No. 66 at 20:5–21:10. That leaves the case, for a second time, without a representative for the
6 putative class and collective. In fact, the only remaining person in the action is Ricardo
7 Castillo, who previously represented to the Court that “I can no longer act as a Named Plaintiff
8 and represent the interests of the putative Class and Collective.” Dkt. No. 44–4 at ¶ 4. Powell
9 asks the Court not to dismiss the class and collective claims so that his counsel can attempt to
10 locate a third purported class and collective representative.

11 In support of that request, Powell cites cases that allowed a plaintiff to substitute
12 another opt-in as the named plaintiff. Dkt. No. 66 at 20:21–21:6 (citing *Myers v. TRG*
13 *Customer Sols., Inc.*, 2017 WL 5478398, at *7 (M.D. Tenn. Nov. 15, 2017); *Hose v. Henry*
14 *Indus., Inc.*, 2016 WL 2755809, at *8 (D. Kan. May 12, 2016); *Lucas v. JBS Plainwell, Inc.*,
15 2012 WL 12854880 (W.D. Mich. Mar. 8, 2012)). Those cases are inapposite where, as here,
16 the only opt-in plaintiff besides Powell has already withdrawn as the named plaintiff and
17 Powell has not identified any named plaintiff to take his place.

18 Nor does this Court’s prior order allowing Powell to substitute into the case support
19 Powell’s request here. There, Powell’s counsel argued that “Plaintiff’s counsel is not
20 requesting that the Court afford Plaintiff additional time to engage in a fishing expedition to
21 seek out a new class representative because Plaintiff’s claims are moot. Plaintiff’s counsel has
22 been retained by Mr. Powell, who is ready to substitute Mr. Castillo as named Plaintiff
23 according to Mr. Castillo’s wishes.” Dkt. No. 50 at 8:1–5. The Court accepted this rationale,
24 holding that “Mr. Castillo’s counsel ‘is able to produce a proposed substitute immediately’—
25 indeed, Mr. Powell has already opted into the action. The court concludes that in such
26 circumstances, Mr. Castillo can be replaced as the named plaintiff.” *Castillo v. United Rentals*

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1 (*N. Am.*, Inc., 2018 WL 3429936, at *3 (W.D. Wash. July 16, 2018) (citations omitted). Those
 2 same facts are not present here. Powell's counsels' speculation that they may find another
 3 substitute class and collective representative does not change the fact that, after Powell is
 4 dismissed, the case lacks a representative on the class and collective claims. Without such a
 5 representative, the putative class and collective claims should be dismissed. *See White v.*
 6 *Geren*, 310 Fed. App'x. 159, 160 (9th Cir. 2009) (affirming district court's dismissal of class
 7 claims where complaint lacked adequate class representative).

8 **III. CONCLUSION**

9 Powell fails to demonstrate that the Court lacks authority to rule upon United Rentals'
 10 Motion. Powell also fails to meet his burden of demonstrating that the Arbitration Agreement
 11 was either procedurally or substantively unconscionable. Therefore, United Rentals
 12 respectfully requests that the Court enter an order (1) compelling Powell to submit to binding
 13 arbitration the claims he asserts in the TAC, and (2) dismissing his individual claims and the
 14 putative class and collective claims in the absence of an adequate representative plaintiff.

15
 16 DATED this 7th day of December, 2018.

17 Davis Wright Tremaine LLP
 18 Attorneys for Defendant

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1 CERTIFICATE OF SERVICE
2

3 I hereby certify that on December 7, 2018, I electronically filed the foregoing with the
4 Clerk of the Court using the CM/ECF system, which will send notification of such filing to
5 those attorneys of record registered on the CM/ECF system.

6 DATED this 7th day of December, 2018.

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10 By /s/ Margaret C. Sinnott
11 Margaret C. Sinnott
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